1986

Cindy Deats v. Commercial Security Bank : Brief of Respondent

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

CINDY DEATS,

Plaintiff/Appellant,

v.

COMMERCIAL SECURITY BANK,

Defendant/Respondent.

Case No. 860372
860322-CA

BRIEF OF RESPONDENT

On Appeal from the Second Judicial District Court of Weber County
the Honorable David E. Roth, Presiding

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Plaintiff/Appellant,	)	
v.	)	Case No. 860372
COMMERCIAL SECURITY BANK,	)	
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STATEMENT OF ISSUES

1. Whether the jury verdict, when viewed in the light most favorable to the prevailing party, had evidence sufficient to support it.

2. Whether the trial court committed a clear abuse of discretion in denying plaintiff's motion for a new trial.

3. Whether it was prejudicial to give jury instruction No. 25.

DETERMINATIVE RULE IN THE CASE

Rule 59, Utah Rules of Civil Procedure (See, Addendum).

STATEMENT OF THE CASE

On or about September 24, 1984, plaintiff commenced this action against defendant Commercial Security Bank ("CSB"). On March 18, and 20, 1986, the above-entitled action was tried before a jury of 8 members. The jurors were read 39 jury instructions by the Honorable David E. Roth, including Instruction No. 25, which is the sole instruction relief upon by plaintiff for purposes of her appeal. (See, Attachment "A.") The jury was instructed on current Utah law concerning the defendant's burden of proof, the doctrine of

comparative negligence and the jury was requested to return a special verdict which accurately reflected Utah law and their verdict. On March 20, 1986, the jury returned a special verdict finding that CSB was not negligent and the appropriate judgment was entered on April 8, 1986. Plaintiff did not object to the jury verdict form or the jury's verdict prior to the time the jury was discharged. On or about April 14, 1986, CSB filed Notice of Entry of Judgment pursuant to Rule 58, Utah Rules of Civil Procedure. On April 17, 1986, plaintiff filed her Motion for New Trial with an accompanying memorandum in support and the affidavits of jurors Julia Etcheverry and Charles Sweet, the two jurors who had not concurred with the other six jurors. On June 2, 1986, the plaintiff's Motion for a New Trial was heard and denied by the Court. Plaintiff's Notice of Appeal was filed on or about July 7, 1986.

STATEMENT OF FACTS

On Monday, February 27, 1984, plaintiff drove up the three ramps in the CSB parking lot and found a place to park on the fourth level at approximately 7:05 a.m. (T. at 69, 71, 73 and 125.) Plaintiff's car slid while driving up the parking ramps and she walked very carefully because she could see how very, very icy it was while walking away from her parking place. (T. at 72-73, 78-79 and 125.) Plaintiff arrived at work prior to business hours and the time that most persons that used the parking lot arrived. (T. at 70, 163-164 and 193.) Plaintiff arrived prior to sunrise at a time when the coldest temperatures are commonly recorded. (T. at 213.) On that Monday morning, following a winter snowstorm, plaintiff was the first

person to arrive at the parking lot. (T. at 69-70 and 125.) Indeed, plaintiff stated that another person was not expected to arrive for 25 minutes. (T. at 70, 128.)

After the plaintiff had parked her car and was walking towards the stairwell to exit the parking terrace, she thought about how slippery the parking terrace was, and that the next car that came up the ramp might slide into her car. (T. at 79.) Accordingly, plaintiff turned around and walked very carefully, because of the icy conditions, back toward her car to move it into a safer parking space. (T. at 79-80.) As plaintiff approached the front of her car, she slipped and fell. (T. at 80.) An individual in a van was on the top level of the lot to spread salt or sand by the time plaintiff had regained her balance and was again standing upright, somewhere between 7:10 and 7:20 a.m. (T. at 82, 84 and 130-131.) Plaintiff proceeded back down the stairwell from the fourth level and across the street to work, where she remained until later that afternoon. (T. at 85.)

CSB did not have a gate or other barrier to prevent individuals from parking in the lot when the parking attendant was not on duty. (T. at 176-177.) Thus, CSB was aware that persons parked in the lot at various hours of the night or early morning without paying. (T. at 189-190 and 203.) Plaintiff's assertion that she had no reasonable alternative but to park in her designated spot is not in accordance with the evidence presented at trial. (T. at 141, 345.)

SUMMARY OF ARGUMENTS

The evidence, viewed in a light most favorable to the jury verdict, shows that CSB was not negligent in failing to maintain a safe parking lot and/or failing to notify plaintiff of the alleged dangerous condition in the parking terrace. Plaintiff failed to show that CSB was negligent in that its employees knew, or in the exercise of ordinary care should have known, that a dangerous condition existed on that date at 7:05 a.m., and that sufficient time elapsed thereafter that action could have been taken to correct the dangerous condition, if any existed. Therefore, this Court should not overturn the jury verdict, since substantial prejudicial error or injustice has not been established by plaintiff.

Similarly, the trial court's denial of plaintiff's motion for a new trial was not based upon evidence in support of the verdict which was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust. Accordingly, this Court must affirm the trial court's denial of the motion for a new trial, since plaintiff's conclusory allegations that the jury verdict was improper do not constitute a showing of a clear abuse of discretion.

Jury Instruction No. 25 is an accurate statement of current Utah law despite the advent of comparative negligence, and plaintiff's own testimony at trial established that the icy conditions were well-known to plaintiff and constituted an obvious or plainly seen dangerous condition within the meaning of Instruction No. 25. Moreover, plaintiff improperly attempts to impeach the jury verdict through affidavits which do not allege sufficient grounds.

ARGUMENT I

THE JURY VERDICT OF NO NEGLIGENCE WAS SUPPORTED BY THE EVIDENCE AND DID NOT CONSTITUTE SUBSTANTIAL PREJUDICIAL ERROR OR INJUSTICE

Plaintiff contends that the jury's verdict that CSB was not negligent is not supported by the evidence presented at trial. However, "[a] party claiming that the evidence does not support a jury's verdict carries a heavy burden." Von Hake v. Thomas, 705 P.2d 766, 769 (Utah 1985). In particular, to overturn a jury verdict "an appellant must marshal all of the evidence supporting the verdict and then demonstrate that, even viewing the evidence in a light most favorable to that verdict, the evidence is insufficient to support it. Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985)" Id. Similarly, the Court in Anderson v. Toone, 671 P.2d 170, 172 (Utah 1983), found that an appellate court should "review the jury's verdict in the light most favorable to the prevailing party. Lamkin v. Lynch, Utah, 600 P.2d 530 (1979), and accord the evidence presented and every reasonable inference fairly to be drawn therefrom the same degree of deference." See also, Von Hake v. Thomas, supra. In Bezner v. Continental Dry Cleaners, Inc., 548 P.2d 898 (Utah 1976), defendants appealed a jury verdict finding defendants liable for fraud arising out of the sale of a dry cleaning business. The Court recited the standard for reviewing a jury verdict as follows:

> Notwithstanding our prerogative of reviewing both the facts and the law in equity cases, the general rule which we frequently have occasion to state and apply is that we indulge the presumption of verity to the findings of a jury and the actions of the trial court thereon; and that we will not disturb them unless it appears that there is substantial prejudicial error, or that the evidence so clearly preponderates against them that we are persuaded that an injustice has resulted.

Id. at 901.

The evidence, viewed in a light favorable to the verdict, shows that CSB was not negligent in failing to maintain a safe parking terrace and/or failing to notify plaintiff of the alleged dangerous condition in the parking terrace. The evidence adduced at trial indicated: that plaintiff need not have parked on the fourth floor of the parking terrace; that plaintiff arrived prior to the time the sun rose and while the parking lot was being maintained; at the time plaintiff slipped and fell an individual was already salting or sanding the parking terrace (which indicates that CSB was already maintaining the lot prior to the normal arrival hour for invitees to the parking lot); and that she was the first parker to arrive in the lot that day.

The only recent case where the Court has examined the potential liability of a private property owner for business invitees who slip and fall on the owner's property was Martin v. Safeway Stores, Inc., 565 P.2d 1139 (Utah 1977). The Court noted that a property owner's liability "should be established only when the condition complained of has existed for a long enough time that the owner should have known about it and corrected it, or has had actual knowledge of the condition complained of." Id. at 1140. The Court found as follows:

> The essential inquiry relating to defendant's negligence is whether the defendant's employees know, or in the exercise of ordinary care should have known that a dangerous condition existed, and whether sufficient time elapsed thereafter that action could have been taken to correct the situation. Owners of stores, banks, office buildings, theaters or other public buildings where the public is invited to come on business or for pleasure are not insurers against all forms of accidents that may happen to any who come.

Id.

Thus, the evidence, when viewed in the light most favorable to the jury's verdict finding no negligence on behalf of CSB, is clearly sufficient to support the jury's verdict. Plaintiff's conclusory assertion that the jury's verdict is not supported by the facts can only be justified if the Court considers evidence which contravenes or does not support the jury verdict.

ARGUMENT II

THE ORDER DENYING MOTION FOR NEW TRIAL WAS PROPERLY ENTERED AND WAS NOT A CLEAR ABUSE OF DISCRETION, PLAINLY UNREASONABLE AND UNJUST

Plaintiff likewise has a heavy burden to bear to overturn a trial court's denial of a motion for a new trial. In Goddard v. Hickman, 685 P.2d 530, 532 (Utah 1984), the Court stated that trial courts have "broad latitude in granting or denying a motion for a new trial, and will not be overturned on appeal absent a clear abuse of discretion." The Court, relying on Nelson v. Trujillo, 657 P.2d 730 (Utah 1982), found that the trial court may grant a new trial on a standard that is not nearly as strict as the standard of appellate review of an order denying a new trial. Moreover, the Court noted that a different standard applies when the appeal is from a denial of a motion for a new trial than for an appeal where the motion for a new trial was granted. In Anderson v. Toone, supra, at 173, the Court restated the standard of appellate review where the trial court has denied a motion for a new trial as follows:

> The trial court has wide discretion to grant or deny a motion for a new trial and we do not reverse a denial unless the "evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust." Nelson v. Trujillo, Utah, 657 P.2d 730 (1982).

Plaintiff has failed to show, and cannot show, that the trial court's denial of the motion for a new trial was based upon a jury verdict that was plainly unreasonable and unjust. CSB was not negligent in failing to maintain a safe parking terrace and/or failing to notify plaintiff of the claimed dangerous condition, since a maintenance person was already on site at the time of the slip and fall, prior to regular business hours, in a lot that could not be closed at night, which shows sufficient time had not elapsed for corrective action. See, Martin v. Safeway Stores, Inc., supra, at 1140.

ARGUMENT III

INSTRUCTION NO. 25 WAS A PROPER STATEMENT OF THE LAW AND CANNOT BE IMPEACHED BY JUROR AFFIDAVITS

Plaintiff asserts that a new trial is justified on the grounds that the trial court, over plaintiff's objection, instructed the jury in accordance with Instruction No. 25. Plaintiff contends that the Affidavits from two of the jury members show that the jury did not attempt to assess the amount of negligence that may have been attributable to CSB or plaintiff. In Rosenlof v. Sullivan, 676 P.2d 372, 375 (Utah 1983), the defendant alleged that the trial court erred in awarding damages, based upon the jury foreman's affidavit. However, the Court found that it had previously "interpreted Rule 59(a)(2) *to allow an affidavit by a juror to impeach the verdict only when the* verdict was determined by chance or bribery." (citations omitted) In addition, the Court stated the reasons for restricting the circumstances when jury affidavits were permissible to impeach a verdict as follows:

> To permit litigants to get jurors to sign affidavits or testify to matters discussed in connection with their functions as jurors would open the door to inquiry into all manner of things which a losing litigant might consider improper: misconceptions of evidence or law,

> offers of settlement, personal experiences, prejudice against litigants or their causes or the classes to which they belong. It would be an interminable and totally impractical process. Such post-mortems would be productive of no end of mischief and render service as a juror unbearable. If jurors were so circumscribed in their deliberations, it is likely that judge and counsel would have to be present in the jury room attempting to monitor and regulate their thought and discussions into approved channels. Fortunately, jurors are under no such limitation, but are allowed freedom in their deliberations.

Id. (quoting Wheat v. Denver & R.G.W.R. Co., 122 Utah 481, 250 P.2d 932, 937 (1952)).

In Johnson v. Simons, 551 P.2d 515 (Utah 1976), the Court affirmed the trial court's denial of a motion for a new trial, despite the affidavits of members of the jury asserting that the jury failed to understand the trial court's instructions, or that it disregarded the instructions in arriving at the verdict. The Court stated as follows:

> A misconduct may be shown by the affidavit of one of the jurors. No claim is made here that the verdict was determined by chance or that it was the result of bribery. The defendants and appellants here do not claim misconduct within the meaning of Rule 59(a)(2). The jury may not be permitted to impeach the verdict returned by it, and affidavits by jurors are inadmissible to show the contrary.

Id. at 516.

In the present case the plaintiff has not alleged misconduct by the jury which would constitute a decision by chance or bribery. Hence, not only are the affidavits hearsay or mental impressions of the remaining six jurors, the affidavits by Mr. Sweet and Ms. Etcheverry are inadmissible. Plaintiff has not established, as she must, that the strenuous objection of counsel was specific and made on proper grounds. In Lamkin v. Lynch, 600 P.2d 530, 533 (Utah 1979), the Court noted that pursuant to Rule 51, Utah Rules of

Civil Procedure, an appellant's objection to a jury instruction must be "specific enough to give the trial court notice of every error in the instruction complained of on appeal." Plaintiff's implicit allegation that the verdict may have been ambiguous is not a sufficient ground for appeal or a motion for a new trial, since special verdicts that are ambiguous must be objected to before the jury is discharged to avoid the expense and additional time for a new trial. Bennion v. LeGrand Johnson Construction Co., 701 P.2d 1078, 1083 (Utah 1985).

Additionally, plaintiff asserts that jury Instruction No. 25 is an incorrect statement of law. The instruction is derived from the case of Whitman v. W. T. Grant Co., 19 Utah 2d 40, 425 P.2d 778, 779 (1967), wherein the Court stated as follows:

> The plaintiff is confronted with the basic proposition that when there is a hazard which is plainly visible, ordinarily one is charged with the duty of seeing it and avoiding it. And if he fails to do so, it is concluded that he was negligent either in failing to look, or in failing to heed what he saw.

In Whitman, the Court was quoting from the prior case of Richards v. Anderson, 9 Utah 2d 17, 337 P.2d 59 (1959). The above-referenced principle of law was thereafter relied on in McAllister v. Bybee, 19 Utah 2d 40, 425 P.2d 778, 779 (1967), wherein the Court noted that this proposition had been cited in at least six prior decisions.

Similarly, in Pollesche v. K-Mart Enterprises of Utah, Inc., 520 P.2d 200 (Utah 1974), the Court stated that "[t]here would be no useful purpose in citing supporting authorities just for the common sense rule that he should look and having the clear onus and ability to see, does not see, or he who looks and sees, but ignores such clear onus and ability is guilty of

contributory negligence as a matter of law, albeit normally the determining of such negligence is the prerogative of the jury." Id. at 203. In recent decisions by this Court, the principle found in Instruction No. 25 has been reaffirmed by the Court. In Ellertson v. Dansie, 576 P.2d 867, 868 (Utah 1978), the Court restated the notion that a plain-to-be-seen hazard must be avoided, in a case involving plaintiff's suit for injuries sustained after plaintiff was requested to untangle defendant's horse's halter and the horse reared and struck plaintiff. The Court affirmed the trial court's entry of summary judgment based upon the following principle:

> Where there is a dangerous condition on one's property, which is just as observable to an invitee as to the owner, the owner has no duty to warn or to protect the invitee except to observe the universal standard of reasonable care under the circumstances.

Id. (citations omitted).

Plaintiff argues that the well-established case law in support of the instruction was decided prior to comparative negligence, and is, therefore, inapplicable.

Any assertion that the plain-to-be-seen theory is inapplicable as a result of the advent of comparative negligence is manifestly incorrect. In Allen v. United States of America, 588 F.Supp. 247 (D. Utah 1984), where twenty-four plaintiffs brought an action against the United States under the Federal Tort Claims Act for cancer allegedly caused by atomic energy testing, the court stated as follows:

> The law expects people to take actions on their own to protect themselves from evident and obvious dangers. Ordinarily one has the the duty to do so. See, e.g. Pollesche v. K-Mart Enterprises of Utah, Inc., 520 P.2d 200 (Utah 1974), Whitman v. W. T. Grant Co., 16 Utah 2d 81, 395 P.2d 916 (1964).

Id. at 355.

In Moore v. Burton Lumber & Hardware Co., 631 P.2d 865 (Utah 1981), defendant appealed from a jury's special verdict finding both plaintiff and defendant negligent. However, under comparative negligence, the jury found plaintiff's negligence to not have been a cause of the injury. Defendant's motion for a new trial was denied. Ironically, the Court held that the trial court should have instructed the jury that there was no duty to warn an invitee of an obvious danger, citing Ellertson v. Dansie, supra, but held the failure to give such an instruction was harmless error. The Court's analysis of the plain-to-be-seen doctrine is substantially similar to Instruction No. 25 as follows:

> There are, of course, certain risks which anyone of adult age must be taken to appreciate. Wold v. Ogden City, 123 Utah 270, 258 P.2d 453 (1953); Prosser Handbook of the Law of Torts (4th Ed.) § 61 P. 394, see also § 68 P. 448. It has long been held that a property owner has no obligation to warn an invitee of dangers which are are known to the invitee or which are so obvious and apparent that he may be reasonably expected to discover them. Defendant specifically contends that the evidence supported its theory that the dangers were obvious and that the defendant, therefore, had no duty to warn plaintiff of such dangers.

Id. at 868. The Court further noted that the jury's special verdict responses were consistent only when the injury was deemed to have resulted from a non-obvious danger, and, therefore, found that it was harmless error to fail to instruct the jury that defendant had no duty to warn of obvious dangers.

Plaintiff's reliance upon case law from other jurisdictions is not controlling in this appeal. Similarly, plaintiff's recitation of the universally recognized standard of care in the law of torts, is not inconsistent with Instruction No. 25. Moreover, plaintiff's attempt to characterize Instruction No. 25 as imposing a duty to see and avoid a hazard which supersedes

plaintiff's exercise of reasonable case is contrary to the express terms of the instruction.

In the present case, plaintiff arrived prior to normal business hours and quite a bit earlier than anyone else, except a CSB employee that was already sanding and salting the lot at the time plaintiff arrived. CSB is not an insurer against all accidents that occur on its premises and insufficient time had elapsed to correct any potentially dangerous conditions and plaintiff's concession that the ice was not only readily observable, but had in fact been observed by plaintiff, refutes any assertion that the ice was a dangerous condition unknown to plaintiff. Accordingly, Instruction No. 25 was an appropriate Instruction to be read at trial, since it accurately summarizes Utah law. Furthermore, the jury affidavits obtained and submitted by plaintiff are patently inadequate to impeach the jury verdict.

CONCLUSION

Overwhelming evidence introduced at trial supports the jury's special verdict, including evidence which showed that it was unreasonable to not avoid the ice on the fourth level of the parking lot early on a Monday morning following a snowstorm, and that CSB had not acted unreasonably in maintaining the parking lot. Jury Instruction No. 25 is an accurate restatement of current Utah law despite the advent of comparative negligence, and plaintiff's own testimony at trial established that the icy conditions were well-known to plaintiff and constituted an obvious or plainly seen dangerous condition within the meaning of Instruction No. 25. Moreover, plaintiff's attempt to impeach the jury verdict through the affidavits of Mr. Sweet and

Ms. Etcheverry was improper, since the juror's affidavits do not allege that the verdict was obtained by chance or bribery.

In conclusion, in the instant case the dismissal of the appeal is clearly justified based upon its spuriousness, the waste of judicial resources and the unreasonable demands on this Court which result from seeking a new trial on an issue already decided by the jury, heard by the trial court on the motion for a new trial and brought before this Court on the present appeal.

It is, therefore, respectfully submitted that plaintiff's appeal should be dismissed.

DATED this 20th day of November, 1986.

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of November, 1986, I served the foregoing Brief of Respondent upon the following, by depositing 4 copies thereof in the United States mails, postage prepaid, addressed as follows:

Robert A. Echard
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Ogden, UT 84401

ADDENDUM

Rule 59. New Trials; Amendments of Judgment

(a) Grounds. Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of new judgment;

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Affidavits; Time for Filing. When the application for a new trial is made under subdivision (a)(1), (2), (3), or(4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

INSTRUCTION NO. 25

Ordinarily, a Plaintiff in any action has the duty of seeing and avoiding, if reasonable, a hazard which is plainly visible, and if the Plaintiff reasonably failed to do so, then the Plaintiff is negligent either in failing to look or in failing to heed what he or she saw.